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# IN THE
# COURT OF APPEALS OF INDIANA

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| DENNIS BURGHER, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0610-CR-959 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Heather Welch, Judge
Cause No. 49G01-0602-FC-018647

**May 17, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Dennis Burgher appeals his conviction for Domestic Battery,[1] a class A misdemeanor. Specifically, Burgher argues that the trial court erroneously admitted evidence of a previous altercation between Burgher and the victim and that there is insufficient evidence supporting the conviction. Finding that the evidence was properly admitted in response to Burgher's claim of self-defense and finding no other error, we affirm the judgment of the trial court.

## FACTS

In January 2006, Paulette Hudson lived with Burgher and their two children in Indianapolis. On January 26, 2006, Hudson and Burgher had an altercation that became physically violent, during which Burgher, among other things, threw Hudson to the floor repeatedly, choked her repeatedly, and sat on Hudson's back with the full force of his body weight. Hudson suffered "excruciating pain" and a dislocated shoulder as a result of Burgher's actions. Tr. p. 52.

On February 1, 2006, the State charged Burgher with eight offenses. On September 27, 2006, following a jury trial, the jury found Burgher guilty of class A misdemeanor domestic battery and acquitted Burgher of the remaining charges. On that same day, the trial court sentenced Burgher to an executed term of 365 days. Burgher now appeals.

[1] Ind. Code § 35-42-2-1.3.

## DISCUSSION AND DECISION

### I. Previous Altercation

At Burgher's trial, the trial court admitted, over Burgher's objection, evidence of a prior altercation between Burgher and Hudson. Burgher argues that the trial court erred by admitting this evidence. Whether to admit evidence is within the sound discretion of the trial court, and we will not reverse a decision to admit evidence absent a manifest abuse of that discretion. Goldsberry v. State, 821 N.E.2d 447, 453-54 (Ind. Ct. App. 2005). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id. at 454. In reviewing the trial court's decision, we will consider only the evidence in favor of the ruling and any unrefuted evidence in the defendant's favor. Id.

Indiana Evidence Rule 404(b) provides that although evidence of a defendant's prior misconduct may not be admitted to prove that the defendant acted in conformity with a certain character trait, such evidence is admissible for other purposes. In particular, such evidence may be admissible as proof of a defendant's intent. The intent exception to Rule 404(b) is available only if the defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of contrary intent. Evans v. State, 727 N.E.2d 1072, 1079-80 (Ind. 2000). A defendant's claim of self-defense is a sufficient claim of contrary intent to open the door to Rule 404(b)'s intent exception. Id. at 1080. Moreover, the evidence is admissible to rebut the defendant's claim that the alleged victim was the initial aggressor. Id.

Here, Burgher testified as follows:

Q. Did you get into an argument [with Hudson]?
A. Yes, that's what it was. It was basically an argument.
Q. And what happened?
A. I was, I'm not going to say the words I was calling her or she was calling me but you know we was just saying foul language to each other back and forth, you know? You know I had my back turned brushing my teeth and she came up behind and started stabbing me with something. I didn't know what it was at first. Then once I got a hold of it, that's when I seen it was a comb with a little steel edge on it, point on it.

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A. . . . It's like a thin comb puncturing my skin and immediately felt it and I jumped. You know I pushed her off of me. You know I went to push her back. That was my instinct.

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Q. . . . Okay, what did you do in response to this exactly?
A. I was trying, at first I was trying to get away from her. Then it came up to my face and that's when I caught her hand. You know I stopped her from, it didn't go all the way in my neck, you know? It just like, cause [sic] I caught her hand. . . .

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Q. At some point you tried to pry the comb away from her, is that correct? Is that what you stated?
A. Yes, ma'am.

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Q. At some point [after you pried the comb away from her] she complained of pain, correct?
A. Yes.

Tr. p. 171-74. Notwithstanding Burgher's argument that he did not plead self-defense, it is apparent from the above testimony that he did precisely that. Essentially, Burgher testified that the only reason he pushed Hudson was out of "instinct" after she allegedly stabbed him with a comb and the only reason he grabbed her was to pry the comb out of her hand. Id. Burgher did not argue that the incident did not occur, he merely argued that the reason he injured Hudson was to protect himself and that she was the initial aggressor. Consequently, the intent exception to Rule 404(b) was properly applied.

The specific evidence at issue concerned a prior incident in which Burgher allegedly tried to drag Hudson up the stairs by her neck. This evidence tends to refute Burgher's claims that, in the incident at issue herein, Hudson was the initial aggressor and that he acted in self-defense. We find that the probative value of this evidence outweighs its prejudicial effect. Consequently, the trial court did not abuse its discretion in admitting testimony regarding the prior altercation between Burgher and Hudson into evidence.

## II. Sufficiency of the Evidence

Burgher next argues that there is insufficient evidence supporting his conviction. Upon a challenge of the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). In reviewing the conviction, we will consider only the probative evidence and the reasonable inferences that may be drawn therefrom in support of the verdict. Id. A claim of insufficient evidence will prevail only if no reasonable factfinder could have found the defendant guilty beyond a reasonable doubt. Ritchie v. State, 809 N.E.2d 258, 270 (Ind. 2004).

To convict Burgher of class A misdemeanor domestic battery, the State was required to prove that Burgher and Hudson had a child in common and that Burgher touched Hudson in a rude or angry manner, causing her to suffer bodily injury. I.C. § 35-42-2-1.3. Burgher argues that there is insufficient evidence proving causation. Initially, we observe that Hudson suffered excruciating pain and a dislocated shoulder, which certainly qualifies as a bodily injury. Ind. Code § 35-41-1-4 (defining "bodily injury" as "any impairment of physical condition, including physical pain").

As for causation, the record reveals that on the night in question, Burgher repeatedly threw Hudson to the floor, repeatedly choked her, and ripped a phone out of her hands. At one point, he threw Hudson to the floor and sat on top of her back, putting pressure on one of her arms. She testified that "with him putting all his pressure down on my body and on my arm, I just, it felt like my arm just went heavy like I didn't have any life in my arm." Tr. p. 53. Immediately following the altercation, Burgher drove Hudson to the hospital. He testified that she was in pain while they were in the car. Id. at 203-04. At the hospital, Hudson was placed in a brace and treated for a dislocated shoulder. Burgher directs our attention to his own self-serving testimony that contradicts Hudson's account of the incident, but this is merely a request that we reweigh the evidence and judge the credibility of witnesses—a practice in which we do not engage when reviewing the sufficiency of the evidence supporting a conviction. The evidence in the record is sufficient to establish that Burgher touched Hudson in a rude or angry manner and that his touching caused her to suffer bodily injury.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.